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Supreme Court, U.S.
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No. 01-0981

In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

vs.

MICHAEL JOHNSON and CompUSA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

REPLY TO RESPONDENT JOHNSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Reply to Respondent Michael Johnson's Brief in Opposition to Larkin's Petition for Writ of Certiorari.

Petitioner Ward S. Larkin ("Larkin") submits his Reply Brief to Respondent Michael Johnson's ("Johnson") Brief in Opposition to Larkin's Petition for Writ of Certiorari[1] ("Petition"). A new point that Johnson raised in his brief in opposition was that Larkin only pleaded claims under the Texas common law. This argument fails. Larkin did properly brief the Texas courts, at all levels, on the important federal question of the Fighting Words Doctrine. [See Petition pages 5-8.] The Texas courts were in error not to have addressed it. The Texas courts' decision to grant Johnson summary judgment is in conflict with *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and progeny. Also, the very veracity of Johnson's brief in

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[1] As the Brief in Opposition for CompUSA raises no new points under the question presented in the Petition, no reply to CompUSA is necessary or appropriate.

opposition, and the veracity of his assertions, allegations, and other factual contentions, are highly suspect.

ARGUMENT

1. Johnson's argument that Larkin only pleaded claims under the Texas common law is without merit.

Johnson is correct that the only issue he asserted when he filed his motion for summary judgment was his entitlement to qualified official immunity under Texas State law. However, Johnson's argument that the Texas courts were correct to render judgment based solely on Texas common law was faulty. Article VI, Clause 2 of the Constitution of the United States of America provides that "the Laws of the United States . . . shall be the supreme Law of the Land." State courts are "not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States – 'the supreme law of the land.' " *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-41 (1816). The State courts must apply federal law when it is applicable and disregard state law when there is a conflict. Federal law includes not only the Constitution, treaties and legislation enacted by the U.S. Congress, but also the interpretations of their meaning by the United States Supreme Court. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Larkin did properly brief the Texas courts on the important federal question of the Fighting Words Doctrine. [See Petition, pages 5-8.] Larkin explained how the Texas courts were to apply this Court's precedent in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and

Gooding v. Wilson, 405 U.S. 518 (1972) to Disorderly Conduct under *Tex. Penal Code Ann.* § 42.01(a)(1). The Texas courts were in error not to have recognized and addressed it, for this single federal issue is that upon which this whole case balances.

However, though not specifically addressed by the Texas courts, and contrary to Johnson's assertion otherwise, the ultimate effect of granting summary judgment in this case was that the Texas courts did make a decision on the federal question of the Fighting Words Doctrine, a decision that is repugnant to *Chaplinksy* and *Gooding*. Precisely, the Texas courts decided that "What the hell are you doing?" spoken in a "slightly louder than conversational"[2] tone of voice are "fighting words" which by their very utterance tend to incite an immediate breach of the peace.

Specifically, by granting Johnson summary judgment the Texas courts decided that Johnson was entitled to qualified official immunity as a matter of law. Summary judgment is only appropriate when, as a matter of law, there are no genuine issues of material fact. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Consequently, by deciding that Johnson was entitled to qualified official immunity, the Texas courts therefore

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[2] In his brief in opposition Johnson exaggerated Larkin's Statement of the Case by stating that Larkin "admitted that the volume of the statements directed at Deputy Johnson were 'louder than conversation'." [See Johnson's brief in opposition, page 1.] The Petition page 3 accurately provides that Larkin's tone of voice was "slightly louder than conversational". Larkin's use of the qualification "slightly" was true, correct and a distinction that Johnson shouldn't have overlooked.

also decided, as a matter of law, that Johnson acted in good faith. Government officials in Texas are entitled to qualified official immunity from suit arising from discretionary acts made within the scope of their authority when performed in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Consequently, by deciding that Johnson acted in good faith, the Texas courts therefore also decided, as a matter of law, that under the same circumstances a reasonably prudent police officer might have felt justified in detaining Larkin for Disorderly Conduct under *Tex. Penal Code Ann.* § 42.01(a)(1). It is considered a good faith act if a reasonably prudent officer might have believed that the detention was justified under the same or similar circumstances. See *Chambers*, 883 S.W.2d at 656. Consequently, by deciding that Johnson was reasonably prudent in his detention of Larkin, the Texas courts therefore also decided, as a matter of law, that "What the hell are you doing?" (Johnson's sole objective fact[3]) is speech that constitutes a violation of *Tex. Penal Code Ann.* § 42.01(a)(1). To justify any detention an officer must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Consequently, by deciding that "What the hell are you doing?" is objectively speech that violates *Tex. Penal Code Ann.* § 42.01(a)(1), the Texas courts therefore also decided, as a matter of law, that "What the hell are you doing?"

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[3] Johnson's impressions about Larkin's and the people in the vicinity's actions or reactions (1) are not objective facts, and (2) are not elements of *Tex. Penal Code Ann.* § 42.01(a)(1).

constitutes fighting words. *Tex. Penal Code Ann.* "[§] 42.01(a)(1) applies only to 'fighting words' which by their very utterance tend to incite an immediate breach of the peace as required by *Chaplinsky v. New Hampshire,* 315 U.S. 568." *Duran v. Furr's Supermarkets, Inc.,* 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied).

The Texas courts' decision becomes even more revolting since Larkin asked "What the hell are you doing?" while asserting his Texas statutory right of Protection of One's Own Property under *Tex. Penal Code Ann.* § 9.41(a). Johnson had both marked on and tried to take Larkin's receipt without consent. [See Petition page 15.]

2. The veracity of Johnson's Brief in Opposition is highly suspect.

In his brief in opposition Johnson states that he generally agrees that the Petition's "Statement of the Case" is accurate. Johnson does, however, point out some discrepancies that he felt were worth noting.[4] [See brief in opposition, pages 1-2.] Most important is what's not included on this list of discrepancies. Specifically, what Larkin said to Johnson when Johnson marked on and tried to take Larkin's receipt: "What the hell are you doing?" [See

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[4] It's interesting that the first such discrepancy deals with a fact that Johnson had earlier conceded. On page 1 of his brief in opposition Johnson objects to Larkin having stated at page 5 in the Petition that "the charges against Larkin were dismissed for insufficient evidence." But in his motion for summary judgment Johnson had already accepted this fact: "The charges [against Larkin] were thereafter dismissed for lack of evidence." [See Clerk's Record (CR) pg. 16.]

Petition pg. 3.] By not objecting to this fact, Johnson is accepting it as true, which adds another inconsistency to Johnson's assertions, allegations, and other factual contentions in the case.

In Johnson's motion for summary judgment he argued that Larkin "exclaimed in a loud voice 'what the hell are you doing, Mother Fucker.' " [See CR 14.] Johnson's expert witness Mike Faas, a Deputy – Instructor at the Harris County, Texas Sheriff's Department Academy – overwhelmingly based his expert opinion in support of summary judgment on the premise that Larkin had used the term "motherfucker". [See CR pages 146-148.] In his deposition Johnson declared that he couldn't recall what Larkin said, but he did declare that he trusted what was written in his original arrest report, reading the pertinent portion into deposition testimony: "Mr. Larkin stated, 'What the hell are you doing, mother fucker'?" [See CR 167.] However, the arrest report itself was not entered into summary judgment evidence.

Conversely, Johnson declared in his affidavit presented in support of his motion for summary judgment that Larkin said, "What the hell are you doing, that's my receipt!" [See CR 152-154.] This coincides substantively with "What the hell are you doing?" If Johnson now accepts either of these as true, then Johnson's brief in opposition should have corrected or withdrawn all of the associated false allegations and false evidence in the case. Johnson should have admitted and corrected the factual errors in his motion for summary judgment. He should have asked this Court to withdraw consideration for Mike Faas' expert witness testimony, for conclusions based on false premises are simply unreliable.

In addition to these inconsistencies, although not on the record, but going strictly and solely to the veracity of Johnson's brief in opposition, is the fact that Johnson is no longer a Harris County, Texas deputy sheriff, but is instead a convicted felon. On February 22, 2001 he confessed to two counts of Aggravated Perjury under *Tex. Penal Code Ann.* § 37.03, Harris County Criminal Cause Numbers 859566 & 859567. On two separate occasions (February 3, 2000 and March 20, 2000) he knowingly presented false statements under oath with the intention to deceive in connection with and material to an official proceeding to determine probable cause for the issuance of a search warrant. On August 6, 2001 he was sentenced to two 10-year concurrent prison terms. On January 25, 2002 the trial judge suspended execution of his prison sentences, granting him shock probation.

Ultimately, if Johnson now accepts that Larkin simply said "What the hell are you doing," or even "What the hell are you doing, that's my receipt," then it's reasonable to infer (even without knowledge of Johnson's predilection for perjury) that Johnson deliberately filed a false arrest report against Larkin. In ***Rhetoric,*** his treatise on the art of persuasive oratory, Aristotle states in Chapter I, Book 14 that "it is argued that a man who will commit a crime in a law-court [for example, as perjurers do] would commit it anywhere."

Respectfully submitted,

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